

COMMONWEALTH OF PUERTO RICO V. ROSSO: LAND BANKING AND THE EXPANDED CONCEPT OF PUBLIC USE

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The (Land) Administration . . . may exercise such rights and powers as may be necessary or proper for the carrying out of the purposes hereof, including, but not limited to, the following:

* * *

(q) To acquire, in the manner provided in this act, private property *and keep it in reserve*, for the benefit of the people of Puerto Rico, for the use of the Commonwealth of Puerto Rico or its agencies.¹

Act 13 of May 16, 1962

Act 13 of 16th of May, 1962, is constitutional in all its aspects, means and manners. It constitutes a legitimate use of public power in protection of that which a community of 2,712,808 human beings existing in a little territory of 3,435 square miles sees as a most precious value for survival: vital space.²

*Associate Justice Carlos Santana
Becerra for the Supreme Court of
Puerto Rico in Commonwealth of
Puerto Rico v. Rosso*

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¹ ACT No. 13 of May 16, 1962 (2d Sess. of 4th Legislative Assembly).

² Commonwealth of Puerto Rico v. Russo, No. 67-172 (Supreme Court of Puerto Rico, December 7, 1967) at 59. All page references are to the untranslated Spanish opinion.

I. Introduction

As the supply of vacant land on which to expand dwindles, the economic, social and cultural blight attendant upon the rapid but relatively unplanned growth of metropolitan areas increasingly becomes a subject of grave concern throughout the world. The two most common traditional approaches to land use problems are now proving inadequate, given the nature of urban sprawl. The first is zoning, basically an exercise of the police power whereby a governmental body restricts the use of land by appropriate regulation without compensating the owner. The restriction must be for the purpose of promoting the health, morals, safety or welfare of some segment of the whole community. Even if this condition is satisfied, many decisions have invalidated zoning regulations as being so restrictive that they constitute an actual taking for which compensation must be paid.³ The restrictiveness of a regulation is evaluated by taking into consideration such factors as surrounding area uses and reasonable return on property values. Yet these factors clearly tend to be linked with *present* usages and values, making it nearly impossible for the government to use zoning as an effective instrument to allow for projected future indeterminate usages. Comprehensive planning for urban areas has demonstrated that successful control of developments requires that the planning instrument allow maneuverability. The traditional power of zoning simply does not allow this indeterminate flexibility. Moreover, zoning is essentially negative. It can preclude undesirable uses of land, but it cannot compel and may not even encourage desirable land uses.

A second approach has been through exercise of the power of eminent domain. If a governmental agency can establish a valid public use or purpose, it may compulsorily purchase land from a private landowner in return for compensation approximating its fair market value. At first glance, eminent domain seems to provide a way around such restrictive factors as present area uses which limit the effectiveness of the zoning power. The government could buy necessary lands at their fair market value and provide for their disposition in a manner best designed to control urban sprawl. The power of eminent domain is clearly an affirmative power, but it has other limitations than that of fair compensation. The power must be exercised for some definite public purpose, and the courts have in the past refused to uphold condemnations without such purpose.⁴

The more effective way to combat urban sprawl is to compel the *non-use* of land for an *indefinite* period of time by an exercise of public power. This would give the government an opportunity to develop the land by selling or otherwise disposing of it with appropriate use restrictions in accord with a master plan for the region. This is the essence of land banking, a scheme embodying the belief that:

³ See cases collected at 101 C.J.S. *Zoning* §29 (1958), n. 80 to 82.

⁴ See cases collected at 26 Am.Jur.2d *Eminent Domain* §27 (1966), n. 17.

. . . land at the urban fringe which is to be developed for urban uses should be acquired by a public agency. Acquisition, in fact, should run well ahead of anticipated need and include the purchase or condemnation of idle or agricultural land well beyond the present urban limits. The public agency, therefore, should be given territorial jurisdiction which includes not only the present central city and surrounding suburbs but a wide belt of undeveloped land.⁵

In effect, land banking is an extension of the power of eminent domain. Although the taking is compulsory and fully compensated, it is accomplished without establishing a specific, contemporary public purpose for the land's use.⁶ The land so acquired and retained for a later unspecified use generally consists of vacant, undeveloped parcels along the fringe of metropolitan areas.⁷ Though the practical difficulties of using this particular method for curbing urban sprawl are not insubstantial,⁸ any

⁵ Reps, *The Future of American Planning: Requiem or Renascence?* 1967 PLANNING 47, at 49. Cf. note 26 *infra* for other advocates.

⁶ *Id.*

⁷ American Society of Planning Officials. NEW DIRECTIONS IN CONNECTICUT PLANNING LEGISLATION 65-66 (1967).

⁸ Reps, *supra* note 5, at 53-55. Two difficulties which Reps stresses stem from the desirable scope of the policy and the methods of land disposal to be employed. As to the first, he points out that:

Realism would seem to dictate that whatever the eventual scope, initial efforts would be rather modest. Time will be required to get under way. Near-in vacant land already includes in its price the anticipated speculative value which our current policies produce. Not all of this land can be acquired because of the financial burden that would be imposed. It may be that we must control development in these areas for the next several years as best we can using mainly traditional methods of regulation. Meanwhile the metropolitan land corporation could be engaged in acquiring land further from the fringe at more reasonable prices while making occasional purchases of more central sites where possible.

With regard to the second, he discusses the relative merits of sale and lease as methods of making land available for development. Although conceding that, "From the standpoint only of effective control over the physical environment either method of disposal can work," he favors a system of leases. This would allow the whole community, rather than a single private owner, to recoup increases in urban land values that result from publicly financed improvements, growth of population, and the process of urbanization.

attempt to apply the method is often frustrated by the legal problem of justifying the compulsory acquisition of this fringe-area land in terms of public use. The regulation of use that results from land banking is so broad and indefinite that it is doubtful that it could be sustained under a traditional interpretation of the eminent domain power. It is basic to the exercise of the power of eminent domain that the condemned land be used for a public purpose.⁹ The problem is that the courts have often construed this to mean a *specific* public purpose, rather than an undetermined, unspecified one. This has been true even in those jurisdictions which do not require that the land be used immediately for the benefit of the public.¹⁰

II. The Case

Against this backdrop of traditional judicial antipathy toward the exercise of eminent domain for the purpose of creating reserves of land for unspecified future development, the Supreme Court of Puerto Rico resoundingly upheld legislation expressly providing for such land banking as a means to cure urban sprawl. The subject of the case is the constitutionality of a taking of private property under the authority of Act 13, passed by the legislative assembly of Puerto Rico on May 16, 1962.

The legislative intent in passing Act 13 is quite ambitious: to eliminate those economic and social ills which accompany the shortage of space caused by unplanned urban expansion. In a lengthy purpose clause, the legislative assembly enumerates the ills that have beset the tiny island with the explosive increase in the use of and demand for land:

(a) That the Commonwealth of Puerto Rico is one of the most densely populated areas in the world; that urban lands, or lands adapted to urban development, are monopolized and kept unused by their owners, which creates an artificial shortage of land and raises its price at a rate higher than the raise in price of other properties and staple commodities; that the speedy raise in the price of land makes it impossible for persons of moderate or low resources to purchase land in appropriate areas, and forces such persons to build their homes outside of close-to-town areas and far from their places of work and other activities; that the raise in the price of land makes for undesirable urban ex-

⁹ 26 Am.Jur.2d *Eminent Domain* §27 (1966).

¹⁰ *Id.*

pansions, which, in turn, creates serious financial problems to the Commonwealth and municipal governments, as the costs of providing public services such as roads, water, sewers, public parks, public health, fire prevention and fire fighting, police vigilance, and others such as are necessary for the protection of life and property, so essential for the development of a community, increase several times; that the raise in the price of land increases the overhead cost of industrial and commercial enterprises and, therefore, sets their products at a disadvantage in competition locally as well as abroad; that the relatively speedy raise in the price of land increases differences in income, inasmuch as unused land in Puerto Rico, both urban and rural, is controlled, to a large extent, by a small number of persons;

* * *

(c) that the raise in the price of land also affects or prevents the implementing of the master plans and is a cause of worry for the public conglomerate and constitutes a serious problem, to control which available public funds may be put to maximum use, by authorizing the acquisition of private property whenever necessary;

(d) that it is in the public interest to avoid, as soon as possible, the excessive and disproportionate increase in the market price of land.¹¹

The purpose clause frankly admits that traditional remedies have so far failed:

(b) that this ever-increasing price of land cannot be controlled, nor the problems thereby created can be solved, by any of the tools available to the Commonwealth and municipal governments; that the levy of taxes and the regulations of

¹¹ ACT No. 13 *supra* note 1, *Statement of Motives*.

physical planning are insufficient; that the regulation on subdivision and zoning operates prospectively for undeveloped and underdeveloped areas and cannot prevent the undesirable, but legal, use of the land; and that the regulation on land subdivision is insufficient to control either the expansion of city limits or the disconnected and inadequate expansion of the cities. . . .¹²

With its aims thus clearly stated, the legislative assembly proceeded to grant broad and sweeping powers to the Land Administration, created by the same statute:¹³

(j) To acquire property in any lawful manner . . . and to hold, maintain, use and avail itself of, or utilize any real or personal property . . .

(k) To sell, grant options of sale, sell by instalments, convey, exchange, lease or otherwise dispose of its property in the course of its normal operations, except by gift, which may only be made for the benefit of the Commonwealth of Puerto Rico and its agencies . . .

* * *

(q) To acquire, in the manner provided in this act, private property and keep it in reserve, for the benefit of the People of Puerto Rico, for the use of the Commonwealth of Puerto Rico or its agencies . . .

* * *

(s) To acquire real property, urban or rural, which may be kept in reserve toward facilitating the continuation of the development of public work and social and economic welfare programs which may be under way or which may be undertaken by the Administration itself, by the Commonwealth of Puerto Rico or its

¹² *Id.*

¹³ *Id.* at §3(a).

agencies, and by private persons for the benefit of the above-mentioned public entities or of the community, including, but not limited to, housing and industrial development programs, in order to prevent the inflation brought about by speculative practices in the purchase-sale of real estate and to allow for population growth in an organized and planned manner. . . .

* * *

(b-1) To sell, whenever it may deem it necessary and desirable, lands or any other interest therein, at such price as it may consider reasonable in order to lower the cost of the houses or to fulfill any of the purposes of this act.¹⁴

Act 13 further provided that possession of the condemned property could be taken before the amount of compensation had been finally determined if an amount equal to a good faith estimate of the value of the property was placed with the court.¹⁵

Clearly the legislature intended to grant the power to take private property and hold it in a land bank for some unspecified future use. Yet land-owners and speculators were not ready to give up their valuable properties without a legal struggle, for these would naturally increase in value as the metropolitan areas spread toward them. This situation led to the conflict which became the case of *Commonwealth of Puerto Rico v. Rosso*.¹⁶

Acting under the authority conferred by Act 13 and within the confines of a plan drawn up subsequent thereto,¹⁷ the Planning Commission began proceedings to acquire land around the city of San Juan. Among the properties involved were two parcels of land — 137.7 by 118.26 cuerdas (chains) and 25.519 by 62.8528 cuerdas — owned by Jorge I. and Carmen Descartes Rosso. Despite an administrative determination that their land could be taken, the Rossos refused to leave. On December 5, 1963,

¹⁴ *Id.* at §7.

¹⁵ *Id.* at §14(b).

¹⁶ See note 2 *supra*.

¹⁷ On August 29, 1962, the Land Administration submitted to the Puerto Rican Planning Board a plan for the development of the metropolitan area of San Juan, under which it intended to acquire private estates surrounding San Juan for the purposes of implementing the legislative aims of ACT 13. On January 23, 1963, the Board approved the plan, the main aim of which was to reduce prices of land around the city. High prices were making it difficult for industries and private individuals to acquire sites and homes. It was declared that the property to be acquired was useful and necessary for the implementation of the plan.

the Commonwealth interposed a decree for forceful expropriation of the Rosso lands for the use and benefit of the Land Administration. The Rossos sued for an injunction to stay proceedings under Act 13 and for a declaration that Act 13 was unconstitutional. On February 24, 1964, the lower court suspended the forceful expropriation decree. On July 2, after a trial on the merits, the court voided the expropriation resolution passed pursuant to Act 13 on the ground that the statute was unconstitutional.

The lower court's opinion was traditionally stated: the concept of public use did not permit the state to exercise the power of eminent domain to condemn private property without some specific plan for the land. Although it considered itself a liberal court and admitted that the term "public use" was incapable of precise definition, the court nonetheless stated that expropriation statutes, which so sharply impinge upon private property rights, ought to be strictly interpreted. Firmly placing itself in the eminent domain school that requires clear public necessity before condemnation is permitted, the court said:

The 'necessity' which justifies an expropriation is that which exists in the present or in the immediate future and it is required for the expropriation itself and for the public works contemplated. . . . *A future indefinite or speculative necessity is not enough.* . . .

Private property, and moreover, the land which is referred to in this plea *cannot be expropriated for a use which is not revealed.* [Emphasis added]¹⁸

The Commonwealth appealed this decision to the Supreme Court of Puerto Rico which reversed the lower court and held Act 13 constitutional in all respects. The overriding theme of the opinion of the Supreme Court of Puerto Rico was that unplanned, unregulated use of land was the cause of all the enumerated ills, and planning and development of land their cure. The Court quoted extensively from the purpose clause of Act 13 and set out numerous statistics calling attention to the explosive growth of the Commonwealth in the last decade and its projected growth in the next.¹⁹

¹⁸ Commonwealth v. Rosso, *supra* note 2, at 30-31.

¹⁹ Among the statistics cited by the court in a footnote to pages 5-10 of the *Rosso* opinion were the following: (1) The rate of building construction went up from approximately 2,000 units/year in the decade 1950-1960 to 7,600 units/year in 1966. In the same 1950-1960 decade some 38,000 private dwellings were constructed in the metropolitan area of San Juan. (2) In the past decade the metropolitan area of San Juan absorbed the entire population increase sustained by Puerto Rico. From a population of 509,000 in 1950 it increased to 648,000 in 1960, despite substantial emigration. It has been anticipated that the

The Court stressed the fact that other cities, notably in Europe, had been condemning private land for land banking purposes for some time.²⁰ It found further support in a 1965 Papal Encyclical issued by Pope John XXIII.²¹

Satisfied that there were social, economic, and moral justifications for its decision,²² the Court turned briefly to the legal issues involved. Indicating that the trial court was perhaps doctrinally correct, the Court chastised it for being old-fashioned:

The view of the sentencing court, which
did not see a public use or interest in all

population will be 863,000 in 1970 and 1,112,000 in 1980. (3) The number of jobs in the metropolitan area has increased from 140,000 in 1950 to 180,000 in 1960, and it is anticipated that there will be 254,000 jobs in 1970 and 326,000 jobs in 1980. Of this increment it is expected that 65% will be in industrial manufacturing and 33% in government. It appears that this will result in an increase of 80,000 in the number of families able to earn \$3,000/year in the decade 1960-70. It is therefore anticipated that the demand for homes will increase spectacularly. By 1980 it is anticipated that 206,000 families will be able to earn \$3,000/year, with most of these families young, the men being in the 20-25 year age bracket. It is anticipated that from 20,800 of these families in 1960 there will be 42,000 by 1970 and 47,000 by 1980. (4) Although the present density has been six dwellings/cuerda it is expected under the new guidelines established by the planning commission that the density will increase to eight living units/cuerda. The 170,000 living units which are expected to be required by 1980 will require some 20,700 cuerdas. (5) To realize the objectives of public housing for 1970 family residence, it will be necessary to construct about 16,000 units of public housing and to develop some 12,000 plots of land. It will be necessary to duplicate this number between 1970 and 1980. (6) In total it is anticipated that there will be required around the metropolitan area about 28,720 cuerdas by 1980; 25,720 of these cuerdas constitute vacant urbanizable land in the metropolitan area included in the outline of the project submitted by the Land Administration.

²⁰ Commonwealth v. Rosso, *supra* note 2, at 35-36.

²¹ *Id.* at 38-46. The Encyclical appears to justify state control of land. The Pope condoned the condemnation of private property on moral grounds if it appeared that the rich were getting richer and the poor were getting poorer because land holdings were so disproportionate that the poor did not even own plots on which to erect homes. The Pope spoke out against speculation and speculators and encouraged the state to exercise economic power to determine the use and ownership of land.

²² In the course of its opinion, the court also cited the following authorities to buttress its view that eminent domain would be exercised for a public purpose if used according to a general plan to purchase land to be held for future development: *Report of the Conference of the United Nations for the Application of Science and Technology for the Benefit of Underdeveloped Areas*, Vol. 5, *People and Living*, 1963 PUBLICATIONS OF THE UNITED NATIONS, 167; J. GRAHAM, *HOUSING IN SCANDINAVIA*, 3-7 (1940); Grier, Grobias and Wagner, *The Problem of Cities and Towns*, CONFERENCE AT HARVARD UPON THE PROBLEM OF URBANISM 87, 93, 110 and 113 (1962); C. HAAR, *LAND PLANNING IN A FREE SOCIETY* 127 (1951); Miscellaneous writings of Don Jose Castan.

this, is somewhat out of focus in these present times.²³

The Court stated that strict limitations upon governmental authority and the preservation of *exclusive* private property rights in the face of the common need and the common good were stale concepts.

Noting that the Puerto Rican constitution guaranteed the right to private property, the Court called attention to a recent amendment to Article 282 of the 1902 Civil Code which broadened the permissible grounds for condemnation to include "social benefit" as well as public use:

No one can be deprived of his property unless by competent authority, for just cause of public use *or for social benefit*, and through payment of just compensation, that will be fixed in a form provided by law. [Emphasis added]²⁴

The legislators who added this phrase generally were the same men who, as constitutional convention delegates, had drafted the property guarantee in the Puerto Rican Constitution. The Court, noting this fact, concluded that public use and social benefit, as well as social interest and common good, were meant to be synonymous. Thus, the exercise of eminent domain for any of these purposes would be legally sanctioned by the Constitution and fundamental statutes of the Commonwealth. In Act 13, the legislature had determined that the taking of property for an unspecified use was consonant with the concept of public use and social benefit. The Court was unwilling to interfere with this legislative judgment:

Once the legislative declaration . . . is for a public purpose, in the significant present concept, it is not incumbent upon this court to interfere with the ways and means which the legislature or its delegated organ chooses to exercise the power of expropriation, nor with a selection which they have made of the land to be expropriated.²⁵

Thus the Court held: (1) that Act 13, the creation of the Land Administration and its authorization to carry out the purposes of the Act were all constitutional in every respect; and (2) that all the works, projects, pow-

²³ *Commonwealth v. Rosso*, *supra* note 2, at 33.

²⁴ *Id.* at 53.

²⁵ *Id.* at 56.

ers, facilities and prerogatives of the Land Administration under the Act were vested, as the legislature intended, with a public interest and a social benefit.

It is apparent that the decision of the Supreme Court of Puerto Rico reflected the urgency of the facts in the situation and not the state of existing law. The Court cited fourteen American and Puerto Rican decisions but did not analyze any of them individually.²⁶ Instead, the first fifty-five pages of the opinion were devoted largely to statistics and non-legal sources illustrating the magnitude of the problem. The rapid growth and limited land in Puerto Rico not only generated hardships for the population in terms of housing and living space but also encouraged speculation in outlying regions which contributed to the non-development of needed land and to increased land prices.

III. The Appeal

The importance of the decision for the concept of land banking as a solution to the disorderly, sprawling growth of metropolitan areas is evident. Such a broad definition of public use has never been so specifically upheld within the legal system of the United States.

But the decision is not without legal support, and certainly is merited by the facts of the particular situation in which urban sprawl had become a major blighting factor. On June 28, 1968, the Rossos filed an appeal from the Supreme Court of Puerto Rico to the Supreme Court of the United States.²⁷ It is submitted that the Puerto Rican decision should be sustained. The technique of land banking deserves judicial and constitutional sanction not only because it is a necessary and vital tool to combat the growing blight of urban sprawl, but also because there are strong

²⁶ *Berman v. Parker*, 348 U.S. 26, 33 (1954); *T.V.A. v. Welch*, 327 U.S. 546 (1945); *United States v. Carmack*, 329 U.S. 230 (1946); *Adirondack Railway v. New York State*, 176 U.S. 335, 349 (1889); *Little v. Loup River Public Power District*, 36 N.W.2d 261, 265 (Neb. 1949); *Pearl River Valley Water Supply District v. Brown*, 156 So.2d 572, 578 (Miss. 1963), *cert. den.* 376 U.S. 970. *See also* *People of Puerto Rico v. Eastern Sugar Associates*, 156 F.2d 316 (1st Cir. 1946) *cert. den.* 329 U.S. 772 (1946); *M. Mercado e. Hijos v. Superior Court*, 85 P.R.R. 355 (1962); *Puerto Rico Telephone Co. v. Tax Court*, 81 P.R.R. 948 (1960); *Commonwealth v. Heirs of Gautier*, 81 P.R.R. 565 (1959); *Commonwealth v. Aquayo*, 80 P.R.R. 534 (1958); *Commonwealth v. Fajardo Sugar Co.*, 79 P.R.R. 303 (1956); *Municipality v. Planning Board*, 68 P.R.R. 600 (1948); *McCormick v. Marrero*, 64 P.R.R. 250 (1944).

²⁷ The appeal was filed pursuant to 28 U.S.C. §1258 which provides that, "Final judgments or decrees rendered by the Supreme Court of the Commonwealth of Puerto Rico may be reviewed by the Supreme Court as follows: (2) By appeal, where is drawn in question the validity of a statute of the Commonwealth of Puerto Rico on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity." The case has been filed on the appellate docket of the Supreme Court as No. 242. *See* 37 L.W. 3035 (1968).

legal arguments favoring its use. These are foreshadowed by some very well-reasoned and forward-looking court decisions.

As the Supreme Court of Puerto Rico was careful to point out, the concept of land banking is not new. In addition to those cited in the *Rosso* opinion, other authorities have for years been advocating a system of land banking such as that set out in Act 13.²⁸ Professor John W. Reps has argued that the following advantages, peculiar to this particular technique, would accrue through its use:

First, this policy of public land acquisition and site development would largely overcome the evils and dangers of land speculation which distort the growth patterns of our cities and which add unnecessarily to the costs of housing and other elements of urban development. It would reduce somewhat the cost of urban land, partly through the nonprofit nature of the operation, partly because of lower interest rates on capital borrowed for land purchases, and partly through advance acquisition of land at lower cost.

Second, the present statutory and constitutional difficulties that arise in requiring dedication of public sites as a condition of plat approval would be avoided. While courts are now looking with more favor on these impositions, many problems remain. All these would be eliminated through a policy of acquiring land to be developed and then simply withholding from subsequent sale or lease those sites needed for a wide variety of public uses.

Third, the system could provide a constant flow of improved building sites to the housing market. At the present time, buildable land becomes available only erratically, subject to the vagaries of personal whim, the owner's tax position, the availability of development capital, the often uninformed appraisal of the probable market, and a host of other uncertainties. Often a paradoxical shortage of

²⁸ *Commonwealth v. Rosso*, *supra* note 2, at 56.

building sites exists even at times of high market demand, thus hindering the activities of builders and frustrating those who are seeking homes. Probably the most often repeated complaint of builders — both large and small — is the shortage of land.

Fourth, the proposed method of directing urban expansion would promote contiguous development rather than the wasteful, discontinuous pattern which now prevails and which results very largely from the whimsical characteristics of the peripheral land market. In order to find land on which to build, the developer must often leap-frog over near-in tracts which are held off the market for one reason or another. The expense of public services and facilities becomes unnecessarily high, and the cost to individuals in time and money is increased by this useless and unessential dispersal. The proposed system would normally place on the market only land contiguous to the existing network of services, but it could also be employed to create new towns or detached satellites where this is found desirable.

Fifth, as programs of urban renewal gain momentum, the method of urban expansion which I advocate can be used to provide land for persons displaced from renewal operations. Public bodies have an obligation here far greater than they now accept. Much of the pain of renewal can be eased and some of the opposition reduced by a policy of providing attractive sites for relocation.

Finally, for the private builder the system would provide a number of important advantages, both economic and otherwise, which might well counterbalance possible financial losses through the elimination of land speculation opportunities.

1. The small builder, increasingly at a disadvantage in coping with the complexities of site design and land development,

would be better able to compete with large-scale tract developers. This is important not only for him but for the consumer as well, in keeping prices down through competitive sales and in providing more opportunities for custom design and variety of accommodations.

2. Builders could concentrate on what they know best, construction and sales. They would avoid the worry, uncertainties, and costs of engineering and land planning services.

3. There would be no long delay as at present in securing subdivision approval, and the added expense of modifying site design would be eliminated.

4. There would be no time and temper lost in negotiating on how much land is to be dedicated for public use or how much in fees is to be paid in lieu of dedication.

5. There would be substantial savings in interest costs on money borrowed for land purchase, since the long period during which a site is now unproductive would be reduced to the absolute minimum.

6. The builder would know exactly the final cost of land and site improvements, thus reducing one of the major elements of uncertainty in the entire process of development.

7. He would have no performance bonds to arrange, no contractors to deal with in arranging for street and utility construction, and no administrative costs for their supervision.

8. Costs for surveying and a substantial portion of his normal legal expenses would be reflected in the price of the land when it is conveyed to him, reducing still further the uncertainties of estimating final costs of production.²⁹

²⁹ Repts, *supra* note 5, at 51-52.

It is candidly submitted that, even without strict legal bases for support, the sociological and legislative facts and statistics noted extensively by the Supreme Court of Puerto Rico should suffice to sustain that Court's decision. The advantages outlined by Professor Reps make land banking a very attractive tool. The factual background of the Puerto Rican situation, including skyrocketing land values, diminishing space and urgent need for homes, makes the *Rosso* case an appealing vehicle for upholding the land banking concept.

However, there are sound legal bases as well for sustaining *Rosso*. Recent cases from several jurisdictions clearly indicate that the concept of public use is expanding along the lines indicated by the Puerto Rican Supreme Court. The new expansion allows condemnation of property for general slum clearance and urban renewal, condemnation of underdeveloped vacant property for redevelopment, and finally condemnation of small parcels of private property with no immediate use specified. In slum clearance and public housing cases arising in the 1930's and 1940's, a majority of state courts were already interpreting the "public use" requirement in eminent domain to mean "public purpose".³⁰ This transformed eminent domain into almost as broad a power as the government's police or taxing powers.³¹ These cases, however, did not involve the resale of publicly acquired land to private developers, a step which was taken only in the 1950's with the advent of comprehensive urban renewal.³² The lower court in *Rosso* complained that the future indeterminate uses inherent in land banking were too uncertain to qualify under the "public purpose" rubric. However, terms such as "slum clearance" and "urban renewal" are not particularly well-defined uses, and "redevelopment" is even less precise. Taken together with this background of court interpretation, these more recent cases, and the fact situations in which they arose, clearly provide a sufficient framework upon which the Supreme Court could base a decision to affirm *Rosso*.

Where the focus has been on the use of condemned property for "slum clearance and prevention," the landmark case is *People ex rel. Gutknecht v. City of Chicago*,³³ a *quo warranto* action to test the constitutionality of the Illinois Urban Community Conservation Act. The Act created municipal community conservation boards authorized to exercise, where necessary, the power of eminent domain to acquire land for the purpose of

³⁰ Comment, *The Public Use Limitation on Eminent Domain: An Advance Requiem*, 58 YALE L. J. 599 at 607-608 (1949).

³¹ 2 NICHOLS, EMINENT DOMAIN §7.2[2] (3d Rev. ed. 1963).

³² The leading case upholding the constitutionality of urban renewal schemes is *Berman v. Parker*, *supra* note 26.

³³ 3 Ill.2d 539, 121 N.E.2d 791 (1954).

redeveloping it and preventing the spread of slum blight to new areas.³⁴ These purposes sound very much like some of those in the purpose clause of Act. 13. To the contention that proceedings under the Act were not for a public purpose, the Illinois Supreme Court responded:

. . . there exist in many urban communities areas which are 'rapidly deteriorating and declining in desirability as residential communities and they soon become slum and blighted areas if their decline is not checked.' It is further found and declared that the existence of these areas is detrimental to the health, safety, morals and welfare of the public, and that *the prevention of slums is a public use essential to the public interest.* [Emphasis added]³⁵

Following this broad definition of public use, the court indicated further:

It is also contended that the 'line of demarcation between a public and a private use in the employment of eminent domain to eliminate slum areas . . . must be elimination rather than the prevention of slums.' But we are aware of no constitutional principle which paralyzes the power of government to deal with an evil until it has reached its maximum development. Nor is there any force in the argument that if the use of eminent domain in a prevention of slums is permitted 'every piece of property in the city or State can be condemned to prevent it from becoming a slum.' Legitimate use of government-

³⁴ *Id.* at 541-543, 121 N.E.2d at 793: "The Act [ILL. REV. STAT. ch.67½, §91.8 — 91.16 (1953)] is concerned with the deteriorating urban areas called conservation areas which are likely to become slum and blighted areas if the deterioration is not arrested. It described such areas, provided for the appointment of municipal community conservation boards and authorized the boards to designate particular areas as conservation areas. Following the designation of a conservation area, the board is authorized after an investigation and hearings to adopt a conservation plan for the area and required to prevent a transition into a slum. . . . After the conservation plan for an area has been approved by the board . . . and if the plan is adopted, the board is authorized to acquire by purchase, condemnation or otherwise, any property, the acquisition of which is necessary or appropriate for the implementation of the plan.

³⁵ *Id.* at 543, 121 N.E.2d at 794.

tal power is not prohibited because of the possibility that the power may be abused.³⁶

In language reminiscent of the *Rosso* case, the court concluded that:

The prevention of slum and blighted areas is a public use and a public purpose. The legislature has found that the conditions which it seeks to remedy exist upon an area basis rather than upon the basis of individual structures. It is now suggested that this finding does not accord with the facts. Legislative action taken to meet the evil in the form in which it most clearly exists cannot be said to be either clearly unreasonable or palpably arbitrary.³⁷

The condemnation of land for the *general* purpose of eliminating slum and blight conditions, which are direct products of urban sprawl, was thus clearly upheld as a valid public purpose.

The Urban Community Conservation Act, however, stops short of Act 13. With considerable particularity the Illinois statute pointed out the physical conditions by which a "conservation area" was to be identified³⁸ and the range of action which conservation plans might recommend.³⁹ And it required the preparation and adoption of a detailed plan embodying the steps necessary to prevent the transition of the specific conservation area into a slum.⁴⁰ Where the court referred to "prevention of slums" as a public use, it was addressing itself not to the specificity of the use but to an argument that the use was *private*, not public. Therefore it is admitted that *Gutknecht* is not authority for a pure land banking concept including compelled non-use or indeterminate use. However, by clear implication the court readily accepted an exercise of the power of eminent domain for a relatively unspecific public use, the elimination of a product of urban sprawl.⁴¹

In *Redevelopment Agency of the City and County of San Francisco v. Hayes*,⁴² the California Appellate Court dealt with redevelopment under

³⁶ *Id.* at 545, 121 N.E.2d at 795.

³⁷ *Id.* at 522, 121 N.E.2d at 798.

³⁸ *Id.* at 549, 121 N.E.2d at 796.

³⁹ *Id.* at 549, 121 N.E.2d at 796-797.

⁴⁰ *Id.*

⁴¹ See also *Rabinoff v. District Court*, 360 P.2d 114 (Colo. 1961); *Zisook v. Maryland-Drexel Neighborhood Redevelopment Corp.*, 3 Ill.2d 570, 121 N.E.2d 804 (1954).

⁴² 122 Cal.App.2d 777, 266 P.2d 105 (1954), *cert. den.* 348 U.S. 897 (1954).

state legislation enacted under the authority of the Housing Act of 1949. In very general language the court upheld the application of eminent domain proceedings to *vacant* but blighted land, emphasizing the emerging view regarding public use and eminent domain:

It might be pointed out that as our community life becomes more complex, our cities grow and become overcrowded, and the need to use for the benefit of the public areas which are not adapted to the pressing needs of the public becomes more imperative, a broader concept of what is a public use is necessitated. Fifty years ago no court would have interpreted under the eminent domain statutes, slum clearance even for public housing as a public use, and yet, it is now so recognized. . . . To hold that clearance of blighted areas as characterized by the act and as shown in this case and the redevelopment of such areas as contemplated here are not public uses, is to view present day conditions under the myopic eyes of years now gone.⁴³

Nonetheless, the court was careful to point out that:

. . . neither aesthetic views nor considerations of economic advantages to the community or a combination of both are sufficient to justify the use of eminent domain for redevelopment purposes. The redevelopment program must be necessary to protect the public health, morals, safety or general welfare through the elimination of blighted areas.⁴⁴

With respect to this warning, however, some decisions have reached a different result, upholding condemnation of largely vacant private property which is *not actually blighted*. In *Cannata v. City of New York*,⁴⁵ such an exercise of the eminent domain power was upheld in connection with a redevelopment purpose. The statute permitted condemnation of areas which

⁴³ *Id.* at 802-803, 266 P.2d at 122.

⁴⁴ *Id.* at 801-802, 266 P.2d at 121.

⁴⁵ 11 N.Y.2d 210, 227 N.Y.S.2d 903, 182 N.E.2d 395 (1963).

did not exhibit "tangible" blight. The complaint centered on the argument that without tangible blight the area in question was not a slum. Though requiring some immediate use and some direct showing of adverse effect upon the public health and welfare,⁴⁶ the New York Court of Appeals upheld this redevelopment statute as it applied to non-blighted vacant land:

The section (72 of Law 1958, Ch. 924) authorizes cities to condemn for the purpose of reclamation or redevelopment *predominantly vacant areas* which are economically dead so that their existence and condition impairs the sound growth of the community and tends to develop

⁴⁶ *Id.* at 211, 227 N.Y.S.2d at 904-905, 182 N.E.2d at 396:

. . . [T]here are in the statutes declarations by the legislature that such reclamation and development of such areas are necessary to protect health, safety, and general welfare, to promote the sound growth of the community, etc. Recited by the legislature were a number of conditions or "combinations thereof" which "with or without tangible physical blight" impair or arrest the sound growth of a community or tend to create slums or blighted areas. There are seven of these listed conditions as follows: Subdivision of the land into lots of such form, shape or size as to being capable of the type of development; obsolete and poorly designed street patterns with inadequate access; unsuitable topographic or other physical conditions impeding the development of appropriate uses; obsolete utilities; building unfit for use or occupancy as a result of age, obsolescence, etc.; dangerous, unsanitary or improper uses and conditions adversely affecting public health, safety or welfare; scattered improvements. The statute then goes on to declare that land assembly by individual or private enterprise for purposes of redevelopment in such areas is difficult of attainment, that the conditions above listed create tax delinquency and impair the sound growth of the community, and that there is a shortage of vacant land in such communities for residential and industrial development, and that it is necessary to clear, plan and redevelop such vacant land, and that for such purposes it is necessary that municipalities be given the condemnation and other powers provided by the Act.

slums and blighted areas. [Emphasis added].⁴⁷

To the contention that the vacant land provisions were unconstitutional, the court responded that public use was broad enough to cover such condemnation:

Plaintiffs' argument, most simply put, is that this taking is not for a "public use" because it is a taking of non-slum land for development in a so-called 'Industrial Park' or area set aside for a new industrial development. *We agree with the court below that an area does not have to be a 'slum' one to make its redevelopment a public use nor is public use negated by a plan to turn a predominantly vacant, poorly developed and organized area into a site for new industrial buildings.*

* * *

The condemnation by the city of an area such as this so that it may be turned into sites for needed industries is a public use. [Emphasis added].⁴⁸

These decisions have upheld various facets of true land banking, but no decision has yet approved the whole concept. *Gutknecht* upheld an un-specific, broad public use. *Hayes* upheld an even less precise use, "redevelopment," in the context of vacant blighted land. *Cannata* upheld redevelopment in the context of vacant land without tangible blight or slum conditions. The most controversial facet of land banking in its truest and purest form is acquisition where no definite use has been determined yet. Where courts in the United States have sustained land banking at all, it has been the taking of a very small area and for a use which even though not immediate is at least vaguely circumscribed. For example, in each of the decisions just noted, a specific plan for future use of the land was required by the urban development statutes involved.

Judicial approval of the acquisition of private land for an unspecified, future use is the first step toward validation of the acquisition of land for

⁴⁷ *Id.*

⁴⁸ *Id.* at 212, 227 N.Y.S.2d at 906, 182 N.E.2d at 397. Other decisions which have emphasized the development needs and specific purpose for the taking include *Fellom v. Redevelopment Agency of City and County of San Francisco*, 152 Cal.App.2d 243, 320 P.2d 884 (1958); *Oliver v. City of Clairton*, 374 Pa. 333, 98 A.2d 47 (1953).

an indeterminate use or complete non-use. In *City of Waukegan v. Stanczak*,⁴⁹ the Illinois Supreme Court upheld the city's condemnation of land for a school building, including some acreage *beyond what appeared to be presently needed*. The court approved the "future condemnation":

As to amount, condemning authorities have substantial discretion to take land sufficient *not only for present needs but for future requirements . . . which they can and should anticipate*. Unless the discretion is abused or an area grossly excessive is taken . . . the taking will not be disturbed. [Emphasis added].⁵⁰

The taking was small, and at least somewhat related to school needs which could be reasonably anticipated. If the matter is one of degree only, the Supreme Court should not balk at affirming the *Rosso* decision solely because more than school needs constitute the focus for Puerto Rico. The difference may, however, be considered one of kind: anticipated future needs of a particular institution or program, such as a school, are more determinate than future needs of an entire urban area.

The Florida Supreme Court, in *Carlor Co. v. City of Miami*,⁵¹ was concerned with the future use of land intended for airport purposes where a long delay in use had followed acquisition. Again it was not the ultimate use of the land which was questioned, but rather the timing of the acquisition and use:

It is not necessary that a political subdivision of the state have money on hand, plans and specifications prepared and all other preparations necessary for immediate construction before it can determine the necessity for taking private property for a public purpose.

During the last ten years the progress, growth and development of the Miami area has been beyond the expectations of most everyone. *It is the duty of public officials to look to the future and plan for the future*. In erecting public buildings and public improvements, it is likewise the

⁴⁹ 6 Ill.2d 594, 129 N.E.2d 751 (1955).

⁵⁰ *Id.* at 604, 129 N.E.2d at 756.

⁵¹ 62 S.2d 897 (Fla. 1953), *cert. den.* 346 U.S. 821 (1953).

duty of public officials to build and plan not only for the present but for the *foreseeable future*. . . . The hands of public officials should not be tied to the immediate necessities of the present but they should be permitted, within reasonable limitations, to contemplate and plan for the future. [Emphasis added].⁵²

IV. Conclusion

This is not to say that courts in the United States have taken the final step and have already approved true land banking. Traditional legal theory has required a rather strong showing of public necessity, with definiteness regarding time and type of development. As we have noted, the "future use" cases have involved more limited and specified subject matters than are involved in the breadth of Act 13 — *Carlor* with future airport facilities and *Stanczak* with future school facilities. The broad definition of public use is still new. Moreover, one encounters language in other recent cases which clearly hearkens back to the narrow concepts of public use and eminent domain:

A future hope based on speculation is not sufficient to justify the taking of private property in a condemnation proceeding⁵³

In addition there are two aspects of *Rosso* which could detract from its value as a general precedent. One such aspect is the equation of "public use" with "social benefit" in the Civil Code amendment referred to earlier.⁵⁴ Puerto Rico has opted for the broad definition of "public use" under which use by any enterprise indirectly promoting "social benefit" or public prosperity might be said to be a public use. The narrow and more traditional definition confines "public use" to public employment or direct usage by a public agency for a public purpose.⁵⁵

That acceptance of the broader definition might be founded in part on the Code language of "social benefit" should not be sufficient to limit the value of *Rosso* as general support for the use of true land banking. First, other decisions discussed above have indicated recognition of a newer,

⁵² *Id.* at 902-903.

⁵³ *Rueb v. Oklahoma City*, 435 P.2d 139, 141 (Okla. 1967), (Involving a suit to block condemnation of property for future airport needs.) See also *Vance County v. Roister*, 155 S.E.2d 790 (N.C. 1967).

⁵⁴ See text accompanying note 24 *supra*.

⁵⁵ 26 AM. JUR.2d *Eminent Domain* §27 (1966).

broader view of public use. Puerto Rico has merely chosen the new view, admittedly making its choice both through code law and the courts. Second, any court would be free to choose between the traditional and newer concepts even in the absence of a legislative preference. The fact that there is such an indication of legislative intent in *Rosso* simply makes the decision that much easier to uphold. Third, and most significantly for purposes of precedent, the equation of "public use" and "social benefit" was not a major factor in *Rosso*. In a sixty-one page opinion, the Court devoted barely four paragraphs to treatment of the amendment.⁵⁶

There is a second aspect which might be seized upon to distinguish *Rosso* in other jurisdictions. The court noted at one point that the powers conferred on the Land Commission by Act 13 verged on emergency powers and indicated that the situation in Puerto Rico verged on an emergency justifying such measures.⁵⁷ Although other courts might be able to claim that no such "emergency" justified similar statutes in their states, such an attitude would be both unrealistic and unfair to the whole rationale of the decision in Puerto Rico. While it is useful to note the "social use" language and the existence of emergency powers as potentially distinguishing factors, it must be emphasized that both were minor considerations.

Both legal precedent and policy considerations point inescapably to the conclusion that land banking should be approved in the *Rosso* case:

1. The courts, in cases like *Gutknecht* and *Hayes*, have recognized that the results of urban sprawl — slums and blighted areas — may be attacked by means of the eminent domain power, and that their elimination therefore falls within the concept of public use.

2. The courts have recognized further, as in *Cannata*, that the land to be taken need not actually be blighted, but only subject to blight if not condemned and redeveloped. There is thus a recognition that eminent domain may be used to strike at the source of the urban problem rather than simply at its consequences: to strike at urban sprawl rather than waiting for slums and blighted areas to develop.

3. The urban renewal statutes sustained in the *Gutknecht*, *Hayes* and *Cannata* cases made the preparation and adoption of a detailed "redevelopment plan" a prerequisite to land acquisition by exercise of the eminent domain power. It is admitted that the essence of land banking is acquisition where no definite use has been determined. However, in *Stanczak* and *Carlton*, the courts have taken a definite step toward approval of expropriation of land for an indeterminate use or non-use: land need not be taken for any purpose beyond a general intent to hold it for future particular needs.

The final step which the Supreme Court must take, therefore, is to dilute

⁵⁶ *Commonwealth v. Rosso*, *supra* note 2, at 55-56.

⁵⁷ *Id.* at 21.

the requirement of particularity or specificity of use and broaden the range within which a true land banking concept may operate. Legal and policy arguments are at hand to accomplish this end.

4. Legal precedent clearly indicates that judicial interpretation of the eminent domain power has been expansive rather than restrictive: the range of permissible uses has been progressing toward the conclusion reached by the Puerto Rican Supreme Court.

5. As Professor Reps has argued, there are important economic and administrative advantages which will result through the use of land banking.

6. In addition, a land banking system will contribute to the prevention of slums. As the municipality acquires land through the exercise of eminent domain, the resulting reduction in land prices will remove the incentive which at present leads speculators to keep their land idle. Land at reasonable prices thus will become available for development in accordance with the general plans formulated by municipal planning authorities as the metropolitan area expands. The availability of such land will facilitate controlled development of the urban area, thereby preventing the emergence of those economic and social ills which accompany the shortage of space caused by unplanned urban expansion and give rise to slums.

7. The fear that condemnation of land for an indeterminate use or non-use will lead to unrestricted governmental expropriation of private property is unwarranted. First, as the *Stanczak* court recognized, the power of eminent domain still will remain circumscribed by the requirements that (a) the area taken must not be excessive, and (b) there must not be an abuse of discretion on the part of the condemning authorities. Secondly, as the *Gutknecht* court pointed out, the fact that all property theoretically might be taken is not sufficient grounds to deter the exercises of eminent domain:

Nor is there any force in the argument that if the use of eminent domain in a prevention of slums is permitted 'every piece of property in the city or State can be condemned to prevent it from becoming a slum.' Legitimate use of governmental power is not prohibited because of the possibility that the power may be abused.⁵⁸

Certainly with this clearly expanding view of public use in recent case law, the Supreme Court of the United States should be able to affirm the *Rosso* decision with much less violence to modern theory of eminent do-

⁵⁸ *People ex rel Gutknecht v. Chicago*, *supra* note 33, at 545, 121 N.E.2d at 795.

main than the trial court in Puerto Rico foresaw. Each aspect of the *Rosso* case has some precedent. However, lack of a definite purpose, futurity and broad-scale purposes have never been present in the same case before. To this extent the *Rosso* decision by the Supreme Court of Puerto Rico represents a departure from the present American concept of public use in eminent domain.

It ought not remain a departure for long.

